APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13950

HELEN HANNA and CICERO HANNA, *Appellants*

v.

ANNIE C. FLETCHER, Trustee of the Estate of FLORENCE JOHNSON, and FRED S. GICHNER IRON WORKS, INC., *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided October 2, 1958

Mr. Paul R. Connolly, with whom *Mr. Jeremiah C. Collins* was on the brief, for appellant Helen Hanna.

Mr. Hugh Lynch, Jr., was on the brief for appellant Cicero Hanna. *Mr. Charles E. Channing, Jr.*, also entered an appearance for appellant Cicero Hanna.

Mr. David G. Bress for appellee Fletcher.

Mr. Richard W. Galiher, with whom *Messrs. William J. Donnelly, Jr., Julian H. Reis* and *H. Mason Welch* were on the brief, for appellee Giehner Iron Works, Inc.

Before EDGERTON, Chief Judge, and BAZELON and DANAHER, Circuit Judges.

BAZELON, *Circuit Judge:* In May 1949, the iron handrail of the outside steps of a house owned by appellee Fletcher gave way as Helen Hanna, a tenant, was using it for support. She fell off the steps into an areaway, suf-

fering injuries which left her paralyzed. She and her husband brought suit in the District Court against Fletcher and the Fred S. Gichner Iron Works, Inc., a contractor to whose allegedly negligent repair of the railing in 1942 the plaintiffs attributed the accident.

On the first trial, the District Court directed judgment for the defendants upon the opening statement of plaintiffs' counsel. We reversed and remanded, holding that plaintiffs would be entitled to recover from both defendants if they could establish the allegations of the opening statement—that the accident was the proximate result of the contractor's negligently executed repair job. *Hanna* v. *Fletcher*, 97 U.S.App.D.C. 310, 231 F.2d 469 (1956). Upon remand the District Court again directed judgment in favor of the defendants, this time at the conclusion of the plaintiffs' case,[1] and the plaintiffs have again appealed. The issue now before us is whether the plaintiffs produced evidence from which the jury could have found the injury to have been proximately caused by negligence on the part of the contractor.

From the evidence introduced, the jury could have found the following facts:

1. The handrail was an iron pipe fitting into collars affixed to two hollow newel posts, one on the upper landing and the other on the bottom step. The lower newel post was fastened to the step by an anchor rod passing

[1] In what respects the plaintiffs' showing was inadequate the trial judge did not say. His ruling was:

> "Gentlemen, as I see it, it would be futile for me to attempt a review of the record which has been made in this court in the last seven days, and any effort to do so would certainly be inadequate. I prefer to place my ruling squarely upon the record as it stands, and doing so, I must announce that the Court finds that the plaintiffs, there are two of them, have failed to make a prima facie case. Accordingly, the motion of each defendant against each plaintiff will be granted."

down through the post and through the step and nutted on the underside of the step.

2. The state of disrepair existing at the time of the 1942 repair job consisted, as the contractor knew or should have known, of the following:

a. The lower anchor rod had rusted through at its point of contact with the step.

b. The step was off-level, sloping down toward the rusted anchor rod.

c. The contact between the step and the newel post through which the rusted anchor rod passed was not sealed by calking, soldering or otherwise.

d. There was a hole in the upper collar, through which moisture could enter and run down through the railing into the lower newel, accumulating at the point of contact between the anchor rod and the step.

3. The contractor's repairs in 1942 consisted of cleaning away the accumulated rust, replacing the old anchor rod by a new one and re-assembling the railing and newel. The contractor did not level the step to prevent water drainage toward the newel. Nor did it seal the seam around the base of the newel. Nor did it close the hole in the upper collar.

4. The 1949 collapse of the railing, which caused Mrs. Hanna to fall, resulted from the rusting through of the anchor rod the contractor had installed in 1942, which caused the newel post to topple and the railing to fall out of the collars.

On the foregoing facts alone, if the jury had found them, it could have concluded that the 1949 accident was the proximate result of a negligent repair job performed by the contractor in 1942. It could have reasoned that the sloping step, the unsealed seam at the base of the newel

post, and the hole in the upper collar, facilitated the access of moisture to the anchor rod and caused it to rust through more rapidly than if the step had been leveled, the seam sealed and the hole closed.

No expert testimony was needed to support a determination that the contractor's omission to level the step, seal the seam and close the hole was a failure to use reasonable care in doing the repair job in 1942. But even if expert testimony were necessary to establish the standard of reasonable care, such testimony was given by the witness Locraft.[2] Similar testimony by the witness Vetterman, an iron worker and instructor in iron work at Bell Vocational School, was proffered, but rejected by the trial judge on the ground that the witness was not qualified as an expert in this case because he had worked on only one iron staircase precisely like the one here involved. We think the record shows the witness to be thoroughly qualified to express the sort of opinion sought to be elicited from him. The basis upon which his testimony was rejected was unduly restrictive and arbitrary.

We hold that it was error to take the case from the jury. We reverse the judgment and remand the case to the District Court for a new trial.

We think it unnecessary to rule on the numerous other alleged errors of which appellants complain. The District Court's usual practice, with respect to a case remanded for a new trial, is not to assign it to the same judge. Hence the questions raised, which relate largely to evidentiary restrictions, may not arise.

Reversed and remanded.

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[2] The trial judge subsequently ruled that the witness, a civil engineer and a member of the District of Columbia Commissioners' Board of Unsafe Structures, was not qualified to give an opinion as to reasonable standard of repairs because his experience related mainly to new construction. We think the record shows the witness to be eminently qualified to give an opinion.

DANAHER, *Circuit Judge*, dissenting: This is a sad case, for Mrs. Hanna was devastatingly injured. This is a hard case, indeed it survived the first appeal only because the court wrote new law.[1] The majority in 1956 pointed out: "Of course we do not say there was negligence; the offers made in the opening statement might not materialize in essential respects in the evidence. . . ." Again the court said, "As we have seen, the opening statement contains detailed specifications of omissions and negligent acts in the course of the repair work. Whether true or not we do not know, that was for proof at a trial . . ." It is clear from the record before us, that no one could have been more keenly aware of the problem of proof than Mrs. Hanna's counsel.

Following this court's 1956 opinion, counsel was bound to reappraise his case as he prepared for trial. He knew that the lower right newel post had been in position when Gichner's men went to repair the steps in 1942, that the railing was intact and that the repairmen had to remove the newel post to get at the anchor rod.[2] He knew that Mrs. Hanna had lived in the premises for some nine years at that time and that no previous repairs had been made to the steps or to the railings. The left-hand railing and the newel posts, so far as had been disclosed, had never developed defects. Counsel knew that Speiser, the repairman, would say he had taken out two handfuls of

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[1] Hanna v. Fletcher, 97 U.S. App. D.C. 310, 231 F. 2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956).

[2] The majority errs, I think, in its finding No. 4. The record does not establish that the 1949 collapse resulted from the rusting through of the anchor rod installed in 1942, hence the contractor's conduct in 1942 was not shown to have caused the lower newel post to "topple" or the railing to "fall out of the collars." The record shows Mrs. Hanna testified that never that she "knew of" had the right railing become "loose, shaky and wobbly." Her complaint was and had been about the shaky steps.

rust, and had chipped away the loose rust.[3] He would testify that after cleaning away the rust he had applied red prime paint where the rust had been. Speiser would say that the first three or four steps of the stairs had been loose and Speiser and his helper had installed vertical plates in the risers and had bolted them in. The newel post would "sit perfectly vertical" and would "take the rods coming from the upper newel post, without the bottom step being level," Speiser was to say. Thus the anchor rod would and did seat the newel post on the bottom of the step, according to the witness, and "When I left, that newel was solid." He also would testify that the step never had been level. Of course, counsel realized that Gichner was not liable for construction of the steps, 50 years earlier. Counsel must have considered Gichner was not bound to rebuild the steps or to substitute a concrete stairway for the iron; he had been employed simply to repair and tighten up the shaky steps.

As Mrs. Hanna's counsel thus appraised his problem, he knew the record would fairly show that when Gichner completed his 1942 repairs, the steps had been firmed by the plates and the bolts. Counsel knew he had no evidence that the steps had ever fallen or given way at any time. The same was true as to the left-hand banister and newel posts. By virtue of his careful preparation and from the pre-trial depositions, Mrs. Hanna's counsel had definite knowledge as to what testimony he could develop as well as of the nature of what he hoped to establish. He was confronted by the fact that although the anchor rod had rusted out at some undetermined time prior to 1942, the newel posts and the banister on the right-hand side had remained intact. They had not fallen. He had to pitch his entire case on the fact that a concealed anchor

[3] Counsel on October 27, 1956, took the deposition of the repairman Speiser who had serviced the steps in 1942.

rod in the lower right newel post had rusted through, and then to ascribe to that failure the collapse of "the whole banister." The challenge was formidable, at best.

At the trial, Mrs. Hanna's counsel developed "the use of the steps by 7 or 8 people living in the house." These people, between 1942 and 1949 included at least Mrs. Hanna's roomers, a Mr. and Mrs. Goodman, Mrs. Hanna's brother and sister who were living with her at the time of the accident, and during part of the time, her two sisters. Not one of these people appeared as a witness. The appellant husband, Cicero Hanna, lived there from 1933 until some time after the wife's fall when he was evicted for non-payment of rent. Although Mrs. Hanna's present counsel had appeared as well for her husband at the time of the first appeal, he did not represent him at the later trial, here reviewed. He not only refused to be bound by the appellant husband's testimony, he informed the trial judge that he "was unwilling to vouch for his credibility." He insisted on building his "case on liability in my own way and I can do so without using Cicero Hanna." Hanna testified under examination by his own counsel, but his various versions of circumstances may have seemed less than satisfactory to all concerned. The wife's counsel declined to cross-examine him, perhaps having concluded that the obvious confusion of the husband had added nothing to the case.

Faced by this sort of situation as the case went forward for the second time, Mrs. Hanna's counsel advanced a new theory. This time, in seeking to establish the repairman Gichner's liability, his opening statement charged that in the course of repairing the steps, Gichner's employee in 1942 had set up an inherently dangerous condition of a special sort. The employee had used dissimilar metals, it was claimed, mild steel and cast iron which, in combination and when joined by water,

created a galvanic reaction.[4] This condition promoted excessive rusting, it was said. Thus, over the period of seven years between 1942 when the repairs were made and 1949 when Mrs. Hanna fell, the anchor rod inside the lower right newel post had rusted away. Accordingly, it was claimed, since Gichner had created a specified inherently dangerous condition in 1942, his conduct in 1942 constituted negligence and "that negligence was a cause of Helen Hanna's injuries." Judge Fahy, writing for the majority in 1956 had said: "We come to the question whether the opening statement made a case to go to the jury against Gichner on both negligence and proximate cause. If wanting *in either respect* the directed verdict was correct."[5] (Emphasis supplied.) Thus, we are now precisely at the point of determining whether if the proof was wanting in either respect, Judge Letts erred in directing a verdict for the defendants at the close of appellants' case.

The house had been built in 1892. Mrs. Hanna became a month to month tenant in 1933. By 1939 or 1940 the iron steps had become loose. Since they "rattled a lot," and were "shaky," Mrs. Hanna became concerned and reported that condition to the landlord. Although she used the steps every day, and sometimes several times a day, when asked if "the right-hand railing was still firm and steady and had never gotten loose, shaky or wobbly," she replied, "Not that I know of." After the 1942 repairs, "The steps were tighter" and as to the railing, "The whole thing seemed in good condition."

Some five years later, the iron railing between the *upper* newel post and the *wall of the house* had "pulled

[4] Like materials had been utilized in the original construction, but there was no evidence as to whether the physical conditions now complained of produced the 1942 rusting in 50 years or any other specific period.

[5] See note 1 *supra;* 97 U.S. App. D.C. at 313, 231 F. 2d at 472.

away from the wall." Mrs. Hanna's counsel asked what was done about it, and Mrs. Hanna replied "They put something like a bunch of putty there and stuck it back." Whoever made the repairs in 1947 cannot be discerned from this record. Gichner, however, had nothing to do with such repairs. Mrs. Hanna was questioned by her counsel and answered as to the 1947 failure, thus:

> "Q. Helen, when this railing that extends back to the wall pulled out, did anything you could observe happen to the upper newel post, the railings and the lower newel post?
>
> "A. They were shaky at first.
>
> "Q. Shaky at first, but when the railing came loose from the wall, did that affect, as far as you could tell, this lower newel post at all?
>
> "A. It seemed like the whole banister was loose.
>
> "Q. When are you speaking of now?
>
> "A. When the rail came out the wall.
>
> "Q. The whole banister was loose?
>
> "A. Yes.
>
> "Q. Somebody put some putty at the top?
>
> "A. That is right."

On cross-examination Mrs. Hanna testified that in 1947 she had reported to the landlord that the railing had come loose from the *wall*. A few days later, the 1947 repairs were made. Mrs. Hanna did not know who had made them—but it was not Gichner!

Two years later, in May 1949, Mrs. Hanna on leaving the porch had descended two steps. She had taken hold of the *top* hand rail. The railing gave way and she plunged to her injury. As her counsel put it to the trial court:

> "Mrs. Hanna, when she was on the stand, testified *in four places and I have the record*, that when she fell *the whole banister* came down. Now this gentleman is going to say that when he got to the scene of the accident, he found *the whole banister* down alongside of the house and, furthermore, he is going to testify,

if he sticks to his deposition, that the anchor rod inside the lower right newel was rusted completely through approximately at the point where it pierced the bottom tread." (Emphasis supplied.)

The witness Ralston, Gichner's repairman who repaired the steps after the 1949 collapse, did so testify. Thus, Mrs. Hanna's counsel was seeking to establish that the whole banister collapsed and fell. Whether it first pulled away from the wall as in 1947, we do not know. Mrs. Hanna could not testify whether the banister first pulled away at the wall of the house or at some other point, or whether the upper newel post next gave way. We are asked to speculate that the whole banister fell down because the anchor rod in the *lower* right newel post was found, after the accident, to have been rusted through. Yet *all* the testimony was, except for the 1947 episode, that up to the time of the 1949 collapse, that railing was firm.

To supply what he surely knew was a missing link, counsel called as an expert witness a civil engineer, Mr. Locraft. Mrs. Hanna's counsel marshalled for the witness the facts he claimed to have proved as to what Gichner's men had done or had failed to do in 1942 and thereupon added:

> "I then want you to assume, sir, the passage of seven years with the occurrence of the ordinary weather conditions in Washington, hot and cold, clear and rain, and the use of the steps by seven or eight people living in the house, probably occasionally people bumping into the post or children perhaps grabbing the post as they go into the house; I then want you to assume a date in 1949, seven years later, when the new rod that was inserted in 1942 again rusted completely through at the same point it had rusted through in 1942, just slightly above the place where the bottom step is penetrated.
>
> "Now, sir, from those facts, are you capable of expressing an opinion with reasonable certainty as to what caused the failure of the newel post in 1949?"

The witness replied that the rod had failed because electrolysis had set in. Then, in technical terms, he explained the processes of corrosion where dissimilar metals are bonded when water strikes such metals. In short, he explained fully the cause of the rusting of the anchor rod. He did not link the total result, the collapse of the whole banister, to the rusted anchor rod, rusted in 1949, it was claimed, as it had been in 1942 when there was no such collapse. He could not have done so for a critical hiatus is clear.

Omitted from the hypothetical question was *any reference whatever to the 1947 episode.* Omitted from the case altogether is any evidence that the anchor rod in the lower right newel post *first* let go, and thereafter precipitated "the whole banister" and Mrs. Hanna into the areaway.

That the anchor rod had rusted through we cannot doubt. There is no evidence as to the condition of the upper newel post and anchor rod. There is no evidence as to the condition of the railing which, after pulling away from the wall in 1947, had been put back with "putty" around it. Mrs. Hanna said, not once but four times, that the whole banister gave way, newel posts, rails and all. The repairman Ralston said the same thing. The court was asked to speculate then, that the rusted anchor rod in 1949 had precipitated the collapse of the whole banister when with a like rusted anchor rod in the same post in 1942 the banister had not given away at all.

Of course, we must grant to Mrs. Hanna every favorable intendment from the whole evidence. Still, it cannot fairly be said to have been shown that Gichner's efforts to repair the shaky steps in 1942 had caused in 1949 the collapse of the whole banister. Much less can it be said if Gichner was shown to have been at fault in 1942, that his

conduct in natural sequence, was unbroken by any efficient intervening cause, and hence produced the injury.[6]

If the appellants' case is "wanting in either respect the directed verdict was correct," as Judge Fahy wrote.[7] I submit the appellants' proof failed in "either" or both respects. Accordingly Judge Letts was bound to rule as he did, and the judgment should be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12050

HELEN HANNA, CICERO HANNA, *Appellants*

v.

ANNIE C. FLETCHER, Trustee of Estate of Florence Johnson, Benjamin F. Fletcher, and Fred S. Gichner Iron Works, Inc., *Appellees*

Appeal from the United States District Court for the District of Columbia

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Decided January 19, 1956

Mr. Paul R. Connolly, with whom *Messrs. Francis L. Casey, Jr.*, and *Stanley S. Harris*, were on the brief, for appellants.

Mr. David G. Bress, with whom *Messrs. Alvin L. Newmyer, Jr.*, and *Sheldon E. Bernstein* were on the brief, for appellee Fletcher.

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[6] *Id.* at 316, 231 F. 2d at 475.

[7] *Supra* note 5.

Mr. Richard W. Galiher, with whom *Messrs. Julian H. Reis, William E. Stewart, Jr.*, and *William J. Donnelly, Jr.*, were on the brief, for appellee Fred S. Gichner Iron Works, Inc.

Before EDGERTON, PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON and DANAHER, Circuit Judges.

FAHY, *Circuit Judge*: Appellants, husband and wife, whom we shall usually refer to as plaintiffs, sued in the District Court to recover damages from the appellees, defendants, for serious injuries suffered by the wife in May, 1949. She fell into an areaway from steps leading to the street from the front door of premises she and her husband occupied as tenants. Defendant Fletcher is the landlord or lessor of the premises.[1] Defendant Fred S. Gichner Iron Works, Inc., usually referred to herein as Gichner, in 1942 had repaired the railing of the steps. The complaint alleges that the repair was negligently and carelessly performed, as a result of which the railing gave way, causing the wife to lose her balance and fall into the areaway.

After answer the case was called for trial. Upon completion of the opening statement of counsel for plaintiffs, in which he set forth the facts he expected to be able to prove, the court ruled that regardless of whether or not these facts could be proved there was nothing for the jury to decide because, as matter of law, the defendants would not be liable. The court thus permitted no evidence to be introduced. We think this was error, because the facts set forth in the opening statement, if proved and not rebutted by defendants, made out, under the legal

[1] The premises were leased to the plaintiffs by the defendant Benjamin F. Fletcher as agent of the defendant Annie C. Fletcher, trustee. A consent judgment was entered in favor of Benjamin F. Fletcher. The question of the liability *vel non* of defendant Annie C. Fleeher, trustee, remains.

principles hereinafter set forth, a case upon the basis of which the jury, though not required to do so, validly could have reached the conclusion that Gichner was negligent and that such negligence was a proximate cause of the accident to Mrs. Hanna. If so, for reasons hereinafter stated, a case for jury consideration was also stated against the defendant Fletcher, the landlord.

The opening statement represented that plaintiffs would prove, in addition to their tenancy, the following facts. In 1942 the cast iron front steps were in a general state of disrepair. The railing on the right as one faces the house had fallen down. Plaintiffs requested the landlord to have the steps repaired. The landlord undertook to do so. She engaged Gichner, an iron contractor, to repair the steps "as necessary." This Gichner undertook to do. Because of the allegedly negligent manner in which Gichner made the repairs, as plaintiffs offered to prove, Mrs. Hanna was caused a fall when, in descending the stairs, she leaned upon the rail and it gave way. The steps were cast iron and descended from the front of the house to the sidewalk, crossing over a basement areaway between the wall of the house and the sidewalk. Railings were located on each side of the steps to prevent those using the steps from falling into the areaway. These railings were iron pipes running diagonally from newel posts on the top step to other newel posts on the bottom step. The railings were fitted into collars and were thereby affixed to the newel posts. The newel posts did not support the railings or take the stress of forces applied against the railings. The newel posts were hollow. An anchor rod passed down through the newel posts, pierced the surface on which the newel posts rested, and was then nutted on the under side of this surface. The anchor rod thus held the rail upright, maintaining it rigid and taking the stress and strain of forces applied to the railing. The right-hand railing collapsed in 1942 because

the anchor rod holding the lower newel post had rusted through where it pierced the bottom tread. The rusting process of the rod deposited a quantity of rust on the bottom tread under the flange of the newel post. When the railing gave way it was torn from its collar on the upper newel, breaking the collar. At this time the steps were in a state of general disrepair; they rattled and were loose. The rear edge of the bottom tread, which should lock over its foundation, was broken off. The foundation riser under this tread did not have proper support. These two conditions caused the tread when stepped upon both to sag and to tilt forward. The sagging would cause the newel post to be pulled inward and the tilting would cause it to be pulled forward. Both actions would place a stress and strain upon the anchor rod at the point at which it was subjected to rusting.

The opening statement also described Gichner's negligence. Gichner's 1942 repairs consisted merely of replacing the bottom anchor rod and welding the railing into the broken upper collar. These two things were inadequate to put the steps and railing into a safe condition and failed to meet good iron construction standards. The deposit of rust from the old anchor rod was not removed. The newel post was re-erected upon it. This deprived the post of a steady base, and, more important, prevented the flange of the newel post from gaining a tight seat against the tread. The flange was held away from the tread by the presence of the rust. This rust and the fracture of the old rod were a warning that any anchor rod in the lower right newel was subject to attack from a drainage of rain and melting ice and snow. Rust deposits are themselves absorbent. By failing to remove the rust deposit, Gichner allowed an open seam to remain between flange and tread. This permitted future drainage to attack the rod within, and the absorbent quality of the rust assured that for a considerable period of time the anchor rod would be encased in a wet bandage.

Plaintiffs offered to prove further that good iron repair techniques would call for the removal of the old rust deposit by chipping or scraping, which would have afforded the newel a firm tight seat on the tread. Whatever seam remained should then have been caulked or bead-welded so as to make the newel watertight. Instead the new anchor rod was left open to the attack of drainage which was to lead inexorably to new rusting. Moreover, no proper foundation was provided under the bottom tread, nor was the rear edge of this tread locked. As a result the sag and tilt of the bottom step continued, thereby causing the anchor rod to be subjected to unusual and unnecessary stresses at its weakest point. Finally, when the railing was welded into its broken upper collar the hole caused by the break was not completely filled. A sizable opening remained on the upper side of the collar through which rain water could and did enter. It would be caught by the interior of the pipe railing and conducted into the lower right newel. This failure to seal the opening permitted the railing to act as a conduit of water into the newel which held the sensitive anchor rod. These inadequacies of repair, by permitting the processes of oxidation to waste the substance of the new anchor rod so that it rusted through at the very place of the old break, led to the fall of the plaintiff Helen Hanna on May 2, 1949.

The opening statement charged that the defendant Gichner by reason of the shortcomings of its repairs created an inherently dangerous condition which was not apparent to the untrained and which imperiled the safety of those having occasion to use the railing in reliance upon its strength and security. The defendant Fletcher, the landlord, was charged with liability for creating an unsafe condition upon leased premises.

I. We are faced initially with the problem of the statute of limitations. The applicable provision of our Code prescribes the period of limitations as,

"• • • three years from the time when the right to maintain such action shall have accrued. • • • § 12-201, D.C.Code (1951).

Defendants contend under this provision that the three years began to run in 1942 when the repairs were made, and since the suit was not filed until December 28, 1950, it was barred. Plaintiffs on the other hand contend that the "right to maintain" the action did not accrue until the accident resulting in the injuries occurred on May 2, 1949, and that the suit, filed within three years thereafter, was timely. We agree. The Code is controlling. The action against Giehner plainly is based on negligence, sounds in tort, and did not accrue until injury resulted from the alleged negligence. *Poole* v. *Terminix Co.*, 91 U.S. App. D.C. 287, 200 F. 2d 746, is not apposite; it was an action for property damages due to breach of an implied warranty to do a workmanlike job. There the suit would have been timely if the limitations period were measured from the time the damage was discovered. The court held, however, that the suit was barred because the cause of action accrued when the warranty was breached, more than three years before the action was filed.[2] The policy of the law to bring repose was given effect. Here, however, the alleged negligence did not ripen into a cause of action until Mrs. Hanna was injured. We cannot shorten the time the Code allows by adding a provision that the personal injury essential to the accrual of the cause of action must occur within three years of the negligence. *Foley* v. *Pittsburgh-Des Moines Co.*, 362 Pa. 1, 38-39, 68 A. 2d 517, 535; *Fredericks* v. *Town of Dover*, 125 N.J.L. 288, 15 A. 2d 784; *Kitchener* v. *Williams*, 171 Kan. 549, 236 P. 2d 64; *cf. Federal Reserve Bank* v. *Atlanta Trust Co.*, 91 F. 2d 283 (5th Cir.), *cert. denied*, 302 U.S. 738.

[2] No question of fraudulent concealment of the breach or resulting damage was involved.

As to the landlord Fletcher the case in the end is no different. In our view, as hereinafter appears, the action against the landlord is also in tort. Therefore, what we have said as to Gichner applies.[3]

II. We come to the question whether the opening statement made a case to go to the jury against Gichner on both negligence and proximate cause. If wanting in either respect the directed verdict was correct. As to negligence, Gichner's chief contention is that even if it be assumed that its repair work was negligently done, its responsibility was only to Fletcher, the landlord, with whom Gichner contracted, and not to Mrs. Hanna, the injured tenant. *Ford* v. *Sturgis*, 56 App. D.C. 361, 14 F. 2d 253, *certificate dismissed per curiam*, 266 U.S. 584, is relied upon as laying down the rule in this jurisdiction that "the negligence of a contractor in constructing a building will not render him liable to a third person, w' . is injured in consequence thereof after the work has been completed and accepted by the owner of the building." *Id.* at 362, 14 F. 2d at 254. The authorities adduced to support a rule so stated rely principally upon the absence of privity of contract between the contractor and injured third party. The court also mentioned as a reason sometimes given "that otherwise there would be no end of suits," adding, however, that "It is elsewhere given as a bette ground that the negligence of the owner in maintaining the defective building, and not that of the builder in constructing it, is the true proximate cause of the third person's

[3] Even if, as the landlord suggests, the action against her might be considered as for breach of contract, the contractual obligation and its breach continued to the time of injury, for, if the obligation existed, it was to keep the premises in repair, not simply to repair them. The Code provision governing limitations upon actions for breach of simple contract, express or implied, is also three years. § 12-201, D.C. Code (1951).

injury. Wharton on Negligence, § 439.'"[4] *Ibid.* None of these reasons furnishes adequate ground for applying to this case a rule that the contractor may not be held liable to the tenants.

The view that such liability is precluded because there is no privity of contract between Gichner and the tenants is at variance with the principle discussed by Judge Cardozo in *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, decided in 1916. Like that decision, we also,

> "• • • put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. • • •" 217 N.Y. at 390, 111 N.E. at 1053.

As to the concern that there would be no end of suits if the contractor might be held liable, there would seem to be all the ends which the law should require. Negligence must be proved. It must be proved to be the proximate cause of the injury. Contributory negligence is a defense. The plaintiff must be within the class protected, that is, one as to whom "the consequences of negligence may be foreseen." Liability exists only upon a reasonable basis consistent with rules properly applicable in tort litigation.

The view that the contractor may not be held liable to the tenants because the proximate cause of injury is not his negligence but that of the owner in maintaining the premises, turns upon a question of fact, not of law. The cause must be decided on the facts, not by a legal fiction set up to bar a factual decision. As was said in *Munsey* v. *Webb*, 37 App. D.C. 185, 189, *affirmed* 231 U.S. 150:

> "• • • 'The true rule is that what is the proximate cause of an injury is ordinarily a question for the

[4] The court enumerated certain exceptions to the general rule. None of them applied there and none we think applies here, so we do not discuss them.

> jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. * * * " (The interior quotation is from *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U.S. 469, 474.)

We return to consider further *MacPherson* v. *Buick Motor Co., supra.* A manufacturer of automobiles sold one of his cars to a dealer who in turn sold it to plaintiff. The question was whether the manufacturer could be held liable to plaintiff for injuries resulting from a sudden collapse of the car due to defective wood used in one of its wheels; that is, as the court stated, "whether the defendant [manufacturer] owed a duty of care and vigilance to any one but the immediate purchaser." The court held it did owe such a duty, saying,

> " * * * If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. * * * " 217 N.Y. at 389, 111 N.E. at 1053.

As Circuit Judge Phillips has said for the Tenth Circuit in *Spencer* v. *Madsen*, 142 F. 2d 820, 823, this decision,

> " * * * has received wide spread judicial approval and may now be regarded as stating the generally accepted law on the subject * * * ",

citing *United States Radiator Corp.* v. *Henderson*, 68 F. 2d 87 (10th Cir.); *cert. denied*, 292 U.S. 650; *Stevens* v. *Allis-Chalmers Mfg. Co.*, 151 Kan. 638, 100 P. 2d 723; Restatement, Torts, §§ 395, 396. See also *Moran* v. *Pitts-*

burgh-Des Moines Steel Co., 166 F. 2d 908, *cert. denied*, 334 U.S. 846; *Foley* v. *Pittsburgh-Des Moines Co.*, *supra*.[5]

The bridge described in the *MacPherson* case between the manufacturer of an article and its third party user, not in privity of contract with the manufacturer, is the same as that between a landlord's contractor or repairman and the tenant of the premises repaired; for in each case negligent conduct often may be expected to result in injury to one reasonably foreseen as a probable user. Here the tenants were to use the steps, not the landlord, as in *MacPherson* the ultimate purchaser was to use the car, not the dealer. See Restatement of Torts, § 385; *Holmes* v. *T. M. Strider & Co.*, 186 Miss. 380, 189 So. 518; *Williams* v. *Charles Stores Co.*, 209 N.C. 591, 184 S.E. 496. In view of these developments in the law, so widely approved and so sound, we reject *Ford* v. *Sturgis* insofar as it stands for the general rule that a person injured by reason of a contractor's negligence cannot recover from the contractor if the injury occurred after the product of his defective work was accepted by the party who engaged him. See *Carter* v. *Yardley & Co., Ltd.*, 319 Mass. 92, 64 N.E. 2d 693, and *Todd Shipyards Corporation* v. *United States*, 69 F. Supp. 609 (D. Me.), and authorities cited therein.

Here there is no question from the opening statement, which in the present posture of the case we must consider as including the inferences properly drawn therefrom, see *Pomeroy* v. *Pennsylvania Railroad*, ... U.S. App. D.C. ...., 223 F. 2d 593, that if Gichner's repair was so negligently performed as to cause the railing to become insecure, there arose a probably dangerous physical condition. The railing was essential to the safe use by the tenants of the steps over the areaway. Use of the steps would be reasonably certain to place life and limb in peril

[5] Mr. Justice Jackson refers to *MacPherson* as the "landmark opinion of Judge Cardozo for the New York Court of Appeals." *Dalehite* v. *United States*, 346 U.S. 15, 52 n. 6, dissenting opinion.

unless the railing were secure. The consequence to the tenants of negligence in repair could be foreseen. Thus there were present the elements required to give rise to an obligation on Gichner's part to avoid negligence which would endanger the tenants in their dependence upon the railing. Of course we do not say there was negligence; the offers made in the opening statement might not materialize in essential respects in the evidence, or might be rebutted. Furthermore, even if the facts offered to be proved were established it would still remain for the jury to decide whether or not they constituted negligence.

If a porch stands for seven years and then collapses the fact that it had stood for seven years would not eliminate negligence as the cause of its collapse. One could illustrate in a variety of ways that use for some years without accident of a part of a dwelling, such as a porch or protective railing, would not in and of itself completely rebut the fact of negligence in its construction or repair. Such use without injury is to be considered in resolving the issue of negligence; but so also is proof of actual defective workmanship. There is here no mere deterioration due to use and the elements. As we have seen, the opening statement contains detailed specifications of omission and negligent acts in the course of the repair work. Whether true or not we do not know; that was for proof at a trial, and then for jury consideration with the other evidence. It was not necessary for plaintiffs to state, in addition, how long the railing should have lasted, once they had stated that while Mrs. Hanna was using it the railing gave way to her injury because of the specified negligent repair by Gichner. In other words, negligence need not be stated in all possible ways. It can be stated in the way plaintiffs say it actually occurred. Here this was done, in detail, not by generalizations. Plaintiffs' offer fairly construed included proof that the workmanship fell below proper construction standards. As a matter

of fact Gichner's principal contention is not that negligence was not stated but that the tenants have no cause of action for injuries due to its negligence, since its contract to repair the railing was only with the landlord. Having rejected this theory of the case as out of line with well established principles of law, we hold that, on the basis of the opening statement, there was a factual issue for the jury to decide whether or not negligence could be attributed to Gichner in making the repairs.

There remains the important question whether the jury could validly find on the basis of the opening statement that such negligence was a proximate cause of the accident. Proximate cause is ordinarily a jury question. This has long been settled in this jurisdiction. See *Munsey* v. *Webb*, *supra*, and *Washington, A. & Mt. V. Ry. Co.* v. *Lukens*, 32 App. D.C. 442, 454-455, where it is said:

> "• • • Without reviewing the many cases bearing on the vexed question of proximate and remote cause, we content ourselves with referring to the following cases which hold that what is the proximate cause of an injury or loss in actions of this kind is ordinarily a question for the jury: *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U.S. 469, 474, 476, 24 L. ed. 256, 258, 259; *Guenther* v. *Metropolitan R. Co.*, 23 App. D.C. 503, 510 [6]; *Schumaker* v. *St. Paul & D. R. Co.*, 46 Minn. 39, 43, 12 L.R.A. 257, 48 N.W. 559. The facts of this present case bring it within that rule. See also *Lindsey* v. *Pennsylvania R. Co.*, 26 App. D.C. 503, 3 L.R.A. (N.S.) 218, 6 A. & E. Ann. Cas. 862, • • •"

And in *Howard* v. *Swagart*, 82 U.S. App. D.C. 147, 151, 161 F. 2d 651, 655, the court, in part quoting from *S. S. Kresge Co.* v. *Kenny*, 66 App. D.C. 274, 275, 86 F. 2d 651, 652, stated:

> "• • • this court has defined the proximate cause of an injury to be 'that cause which, in natural and

[6] The correct citation to the *Guenther* case is 23 App. D.C. 493.

> continual sequence; unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.' * * * "

See, also, *LeFoe* v. *Corby Co.*, 38 App. D.C. 54, 61-62; *Richmond, F. & P. R. Co.* v. *Brooks*, 91 U.S. App. D.C. 24, 26, 197 F. 2d 404, 406, *cert. denied*, 344 U.S. 828.

We cannot say as a matter of law that the fault of Gichner, assuming it were proved, was not a cause which in natural sequence, unbroken by any efficient intervening cause, produced the injury. Of course the jury could find for Gichner in this regard; but the law itself does not say that the passage of nearly seven years, or the action of the elements, with respect to a facility built for use while constantly exposed to the elements, constituted an efficient intervening cause of the giving way of the railing so that any causal connection between Gichner's negligence and the giving way was necessarily broken. Over and above the normal effect of use and the elements it was here clearly stated that specified defects in the repair caused conditions which precipitated the accident at the time it occurred. This was the case stated. In these circumstances the law says, we think, that the question of proximate cause is one of fact for the jury. Moreover, as we have indicated elsewhere, negligence on the part of the landlord, or of the tenant, in failing to maintain the railing in good condition, whichever had the responsibility, while it may be considered by the jury in determining proximate cause, is not by virtue of law itself, regardless of the facts as a whole, an intervening cause which lifts all responsibility from Gichner's shoulders. However heavy the plaintiffs' burden of proof in bringing home proximate cause to Gichner's negligence, the problem is within the realm of facts for the jury and not of law for the court except as the court must guide the jury by appropriate instructions.

To hold that the issue of proximate cause, as well as the issue of negligence, was for the jury, is not to make the contractor an insurer. On the contrary, the issues of fact upon which liability depends are open. Once we accept the rule followed by courts generally, in rejecting the notion that even though a contractor's negligence is the proximate cause of an injury to a tenant who is foreseen to be the one who is to use the repaired facility, nevertheless the contractor cannot be held liable because his repair contract is with the landlord, the facts offered to be proved bring this case within the general pattern of tort litigation proper for jury trial.

III. We come now to the question of the landlord's liability. The only theory presented by appellants is that since Gichner's repair work created an unsafe condition upon the premises the landlord is liable under the doctrine of *Bailey* v. *Zlotnick*, 80 U.S. App. D.C. 117, 149 F. 2d 505. This puts aside the question whether, notwithstanding *Bowles* v. *Mahoney*, 91 U.S. App. D.C. 155, 202 F. 2d 320, *cert. denied*, 344 U.S. 935, the landlord should be held liable because of an obligation to keep the premises in repair. In *Bowles* v. *Mahoney* it is stated that the lessor, absent any statutory or contractual duty, is not responsible for any injury resulting from a defect which developed during the term.[7] Judge Bazelon, dissenting, thought this rule should be abandoned, saying the court should "cast the presumptive burden of liability

[7] The court quoted *Security Savings & Commercial Bank* v. *Sullivan*, 49 App. D.C. 119, 120, 261 Fed. 461, 462, as follows:

> "* * * It is settled law that where the owner of premises, by lease, parts with the entire possession and control of the premises, and the tenant, either by express provision of the lease or by the silence of the lease on that subject, assumes liability for the keeping of the premises in proper repair, the tenant, and not the owner, will be liable in case of an accident due to negligence in allowing the premises, or any portion thereof, to get out of repair."

upon the landlord" in the absence of a contrary arrangement for the tenant to make repairs. In the case at bar the court sitting en banc is not called upon to choose between these conflicting views, for appellants do not request this.[8] They argue for application of the more limited rule set forth in *Bailey* v. *Zlotnick, supra.* Here, as there, the landlord undertook to have the repairs made and employed an independent contractor to make them. *Bailey* v. *Zlotnick* held that, notwithstanding it was the tenant's duty to repair and there would have been no violation of the landlord's duty had the plaster which caused the injury fallen through mere neglect, the landlord was "under a duty not to create an unsafe condition on the premises either permanent or temporary by any affirmative action on his part." Such affirmative action was attributed to him when his contractor created the condition. This is another way of saying that when the negligence of the landlord's contractor is the proximate cause of the injury, the landlord as well as the contractor may be found liable if the injury is not due to the negligence of the contractor in the actual performance of the details of the work but is due to "the condition of the premises which results from the negligence."[9] See, particularly, note 4, *Bailey* v. *Zlotnick.* In the case at bar, the injury clearly was caused by the "condition of the premises" rather than by Gichner's "performance of the details of the work." The landlord urges, however, that here, in contrast with *Bailey* v. *Zlotnick,* no unsafe condition of

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[8] In which event the better practice in such an important matter is to refrain from deciding the question. See *Lehker* v. *Joyce,* 51 App. D.C. 35, 36, 273 Fed. 763, 764; *Kirk* v. *St. Joseph Stock Yards Co.,* 206 F. 2d 283, 287 (8th Cir.); *World Fire & Marine Ins. Co.* v. *Carolina Mills Dist. Co.,* 169 F. 2d 826, 829 (8th Cir.).

[9] See *Thomas* v. *Lane,* 221 Mass. 447, 109 N.E. 363, where it is assumed that a tenant could recover against a landlord if he and not his invitee is injured when the landlord gratuitously agrees to repair, does so, and is negligent in so doing.

the premises was *created* even if Gichner was negligent, because the railing was already unsafe when Gichner undertook its repair. But if the landlord's contractor left the railing in an unsafe condition, the existence of such a condition prior thereto is immaterial. Of course the landlord will not be liable unless the jury finds that the injury to the plaintiff occurred as a consequence of Gichner's negligence. But we cannot on the one hand hold, as we do, that Gichner might be found liable in tort for having negligently left the railing in such condition as would probably be certain to place the life and limb of the tenants in peril, and on the other hand hold, with respect to the landlord, that this condition was not an unsafe one within *Bailey* v. *Zlotnick*. It is true this makes the responsibility of the landlord like that of the contractor where the condition of the premises, brought about by his contractor, is the cause of the injury. But we see no objection to this. The responsibility is not a broad one. The principles of the *MacPherson* case, though applied to a contractor as well as to a manufacturer, as has been generally done by the courts, are limited to the negligent creation of danger which results in injury to one whom the author of the danger ought to be on guard to protect. Furthermore, there is left to the landlord the opportunity to convince the jury that the proximate cause of the injury was not the unsafe condition of the premises.

Reversed and remanded for further proceedings not inconsistent with this opinion.

BAZELON, *Circuit Judge*, with whom EDGERTON, *Chief Judge*, joins, concurring: I concur in the foregoing opinion of the court. I would add only this. *Bailey* v. *Zlotnick*, 80 U.S. App. D.C. 117, 149 F. 2d 505 (1945), is sufficient authority, as the court says, upon which to rest the landlord's liability. Under that case, a landlord, who is not

required by agreement to make repairs but does so voluntarily, is "under a duty not to create an unsafe condition" in doing his beneficent act. But since the effect of this principle may be to stifle such beneficence, I would have preferred to rest liability on a broader view set forth in my dissent in *Boeles* v. *Mahoney*, 91 U.S. App. D.C. 155, 160, 202 F. 2d 320, 325, *cert. denied*, 344 U.S. 935 (1953). According to this view, the realities of modern day urban living require that "in the absence of express provision to the contrary, a landlord who leases property should be held to a continuing obligation to exercise reasonable care to provide that which the parties intended he should provide, namely, a safe and habitable dwelling." 91 U.S. App. D.C. at 161, 202 F. 2d at 326.

PRETTYMAN, *Circuit Judge* with whom WILBUR K. MILLER and DANAHER, *Circuit Judges*, join, dissenting:

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In respect to the Contractor

We do not find in the question we must decide the abstruse legal problems found there by our brethren. We would affirm the District Court, because we agree with the trial judge upon the simple proposition that counsel for the plaintiffs failed to state a case.

The case sounds in tort. If it does not rest upon tort it is barred by the statute of limitations. The tort upon which it rests is negligence. The negligence is alleged to have been committed by the contractor which in 1942 repaired a cast-iron railing outside a dwelling. The railing served safely the people entering and leaving the house for seven years after the repair job. It gave way in 1949. The trial court directed a verdict for the defendants upon the completion of the opening statement of plaintiffs' counsel.

This opening statement was not an ordinary, casual, preliminary sketch, designed merely to familiarize the jury with the nature of the case. Counsel was put on notice, prior to making the statement, that a motion to dismiss would be made when he had finished. So he knew he must state his case if he had one. After the statement and the motion for a directed verdict, and before ruling, the trial judge asked whether counsel had anything to add.[1] The attorney replied he did not think so except for several matters relating to the lease, which he then stated. We are assured, therefore, that he stated the maximum his facts would allow.

The statement of counsel for the plaintiffs was to the following effect:

The person injured was a tenant in the house and had lived there for sixteen years before the accident. The front entrance to the house was up a flight of cast-iron steps with a cast-iron railing. This railing gave way in 1942. This same tenant or her husband reported the matter to the landlord, and the landlord employed defendant contractor, Gichner, to make the repairs. Repairs were made. In 1949 Helen Hanna was going down the steps and grasped the railing. It gave way, and she fell and was injured.

The railing was secured at the top and bottom steps by newel posts. Inside the posts were anchor rods secured on the underside of the step. Before 1942 the steps rattled and tilted. Counsel for plaintiffs said: "We will show you, ladies and gentlemen, that what caused this railing to give way was that the anchor rod inside this newel post rusted out." He said the contractor, Gichner, in 1942 did several things which brought about that result. At that time the anchor rod had rusted out and there was an accumulation of rust on the steps under the newel post.

[1] See McGovern v. Hitt, 62 App. D.C. 33, 64 F. 2d 156 (D.C. Cir. 1933), *cert. denied*, 290 U.S. 637, 78 L. Ed. 554, 54 S. Ct. 54 (1933).

Gichner put in a new rod but did not remove the rust. Counsel said plaintiffs would show that to replace an anchor rod in that fashion is not good iron construction and exposed the rod to rust. The footing for the riser on the bottom step was gone in 1942; Gichner did nothing about that, so the step did not bear on the support. The back edge of the bottom tread was broken off, so that the step sagged and pulled on the newel post. This made it subject to erosion and "it would be inevitable that it would give way." Plaintiffs would show that under good construction practice a support should have been built so that the step would not sag. Further, the railing was held in place by a collar, which was broken; Gichner did not replace the collar but welded the rail into the collar, leaving a sizeable hole. Rain water would run into this hole, through the railing, and into the newel post.

Counsel for plaintiffs said: "Now we will show you, ladies and gentlemen, those four items of what was done, and what was improperly done, back in 1942. We will show you, as I said, that they led just as inexorably as death itself to the collapse of this rail in 1949." Counsel went on to describe Mrs. Hanna's injuries, which were severe. He concluded: "That negligence is this: Annie Fletcher, the landlord, undertook to have those premises repaired. We claim they were repaired in a negligent manner, that these steps and this railing constituted an unknown danger, unless they were properly constructed and properly repaired, because people would invariably rely on that railing in going down the steps crossing the areaway."

Counsel then described the injuries, and thus concluded the statement.

Whether the trial judge properly directed a verdict on the conclusion of this statement depends on whether a case in negligence had been stated. To make a case it was necessary for plaintiffs to show that the contractor was

negligent and that its negligence was the proximate cause of the injury.

One does not state a case of negligence merely by adjectives or by rhetorical summations. It is easy enough to aver that a defendant did not do what a prudent man should have done, but such a declaration is not enough to state a case. Negligence must be made out by a recitation of facts. What facts did the plaintiff say he would prove?—not what descriptive phrases did his lawyer use. Counsel in the case at bar said this railing gave way because the anchor rod rusted out. The maximum of his claim was that the railing rusted out. But the facts he recited showed that for seven years following the repair job the railing stood, in constant service, out-of-doors, as part of the entrance to a house, in sun, rain and snow, cold and heat, freezing and scorching, without breaking or falling or causing injury to anybody. There were seven years of wear and tear by constant use, seven years of the destructive forces of the weather working on a piece of cast iron. For seven years the railing was safe.

This is not a case in which an object supposed to withstand certain stresses collapsed when it was subjected to such stresses. This railing endured for seven years the use for which it was designed. No claim is made that the strain under which it collapsed was any different from that which it had withstood all those years. The railing simply wore out from the use and the weather.

The fact of seven years' safe use made a strong initial case that reasonable care had been exercised in the repair.[2]

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[2] See, *e.g.*, Ford Motor Co. v. Wolber, 32 F. 2d 18 (7th Cir. 1929), *cert. denied*, 280 U.S. 565, 74 L. Ed. 619, 50 S. Ct. 25 (1929); Dillingham v. Chevrolet Motor Co., 17 F. Supp. 615 (W.D. Okla. 1936); Auld v. Sears, Roebuck & Co., 261 App. Div. 918, 25 N.Y.S. 2d (1941), *aff'd*, 288 N.Y. 515, 41 N.E. 2d 927 (1942); Jamison v. Reda Pump Co., 190 Okla. 593, 126 P.2d 71 (1942); Miller v. Davis & Averill, 137 N.J. 671, 61 A. 2d 253 (1948); Gorman v.

This outstanding fact faced plaintiffs when they attempted to state a case of negligence against the contractor and when they sought to establish that the negligence was the proximate cause of the injury. Their problem was to assert facts which would show that the collapse of the railing in 1949 was directly, without intermediate cause, the result of negligence in 1942.

This railing was made of cast iron. Cast iron rusts, and especially does it rust when exposed to weather and to wear. Counsel declared that the repairs "led just as inexorably as death itself to the collapse of this rail in 1949." But weather and wear alone lead just as inexorably to the collapse of a cast-iron stair rail. The critical problem was a matter of time. The *sine qua non* of plaintiffs' case was that the collapse in seven years was so much sooner than the normal inevitable disintegration that negligence in the repair work was shown. What was the normal expected life of such a railing under such conditions? Was it so much longer than seven years that the collapse at the end of seven years showed negligence in the construction? The obvious requirement for making a case of negligence upon the basic facts stated was to show that, had the railing been properly repaired in 1942, it would have lasted substantially longer than seven years. This was the very heart of plaintiffs' case. But no word in the statement anticipated proof of how long the railing should have lasted. The case presented in the statement was on the bare isolated assertions that the work in 1942 was not "good" construction and the rail rusted out in seven years. That was all.

Moreover, in the face of the fact of seven years of safe service, another essential of plaintiffs' case was the main-

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Murphy Diesel Co., 3 Terry (42 Del.) 149, 29 A. 2d 145 (1942); Howard v. Redden, 93 Conn. 604, 107 Atl. 509 (1919). *Cf.* De Salvo v. Stanley-Mark-Strand Corporation, 281 N.Y. 333, 23 N.E. 2d 457 (1939). *But see* Hale v. Depaoli, 33 Cal. 2d 288, 201 P. 2d 1 (1948).

tenance of the railing—the painting, oiling or scraping—necessary to keep it in repair. This sort of facility obviously must be kept in repair, protected, just as a house or a machine must be. Merely to show the railing rusted out in seven years would not prove that a repairman that many years ago was negligent. The contractor on that job was not liable for a subsequent failure of maintenance or upkeep. An essential element of plaintiffs' case was that the railing had received during the seven years the normal maintenance necessary to keep it in serviceable condition. No word on that subject was proffered in this case. It was a fatal lack.

Counsel for plaintiffs said he would show the repair work by this contractor was not "good" construction. The established standard for measuring negligence is what a reasonably prudent man would do, and the evidence is what is customary in the trade. Counsel did not propose this standard or this proof; he proposed a new standard and a different one, and a new and different proof. The established methods are factual and are proved as factual matters. The standard proposed here is purely a matter of opinion—whether in a witness's opinion this was good construction; not whether it was customary or what a reasonably prudent contractor would have done. The ruling of this court means, in ultimate effect, that a plaintiff can get to a jury if he presents testimony that the given construction, or practice, was not, in the opinion of the witness, "good" construction or practice. We do not agree with so fundamental a change in the establishment of negligence.

What we have said about negligence applies with even greater force to the other phase of plaintiffs' case, proximate cause. Plaintiffs were required to show facts which tended to prove that the repair work in 1942 was the cause, and the proximate cause, of the collapse of the railing in 1949. Faced with the fact of seven years of safe service,

seven years of innumerable events and incidents, weather and wear, they needed to show some connecting relation, some negative of the compelling force of the seven years of safe use. The principles have been elaborately discussed by the authorities. Some advocate a "But for" rule, that but for the act of the defendant the damage would not have occurred. Some state a "Probable Consequence" rule, that a wrongdoer is liable for probable consequences only.[3] In any event causation is the true ultimate essential in this phase of a plaintiff's case, and the causation is a factual matter. Plaintiffs in the case at bar faced a fact of seven years of safe use after the alleged wrongful act. They were required to show a causal connection. They had to negative that long, safe use. Viewing the matter under one statement of the rule, if collapse under the given stress at the end of seven years' use, without normal repair meantime, would have occurred in any event due to wear and weather, the repair work in 1942 cannot be regarded as the proximate cause of the failure. Plaintiffs had to span that gap with some factual showing. Or, viewing the matter from the standpoint of the other rule, the contractor was not liable unless collapse at the end of seven years' use was a probable consequence of his work. Plaintiffs were under necessity of presenting facts which showed that as of 1942 the collapse in 1949 was a probable consequence of the work. Plaintiffs offered no factual data on the factual problem of causation. There were rhetorical conclusions, but no word of factual data to span the gap of seven years appears in their statement. Surely one does not show proximate cause, or any cause, by showing merely that a cast-iron railing was repaired in 1942, the work was not "good" construction, and seven years later it rusted out. The plaintiffs simply failed to state a case of proximate cause, in my judgment.

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[3] See Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 106, 114 (1911); McLaughlin, *Proximate Cause*, 39 HARV. L. REV 149, 155 (1925).

Cases like the one at bar present problems not found in the ordinary negligence case. The fact that an article has served its appointed purpose for a long period of time may not in itself conclusively bar all claims of negligence against the original contractor. But neither may a plaintiff skip backward over intervening years and intervening elements at work and hold a repairman liable for the normal results of seven years of wear and deterioration. Plaintiffs' counsel was given full opportunity to state his case. To succeed it was necessary that he do more than point to the fact of repair and the fact of collapse and assert merely that the repair was not good iron construction.

It may be that plaintiffs stated a case against an insurer. The fact of the work, plus the fact of the collapse, may well make a case of liability upon an insurance, although even in such a case the seven years of safe service might be a bar. But this contractor was not an insurer. There is no law that makes a contractor an insurer. This case had to be made in negligence, and that is a different problem. It seems to us that the court, in the present opinion, ignores the difference.

There is much substance and sound sense in the cases which have dealt with this problem in the past. A study might well begin with *Huset* v. *J. I. Case Threshing Mach. Co.*[1] and the opinion written by Circuit Judge Sanborn. Originally there was a general rule, which achieved almost universal acceptance in England and this country, that a contractor was not liable to third parties for negligence. The premise was non-privity of contract. But exceptions arose and also came to be universally accepted. One such exception recognized many years ago was, as stated in *Huset*, that an act of negligence by a manufacturer or contractor which is imminently and inherently danger-

[1] 120 Fed. 865 (8th Cir. 1903).

ous is actionable. In *MacPherson* v. *Buick Motor Co.*[5] then Associate Judge Cardozo wrote that liability of the manufacturer rests upon the principle that he ought to be liable for negligence if the article is reasonably certain to place life and limb in peril if negligently manufactured.[6] In *McPherson* the court had before it an automobile wheel made of wood. The wood was defective, and the wheel collapsed. But the wood was defective when it was put in the wheel; it was liable to collapse from the moment of its first use. We do not have such a case before us. To be sure, a railing alongside a stairway may be a dangerous thing, and, if it were of defective material or so defectively made that it collapsed when put to use, we might have a case comparable to *MacPherson*. But in our case the railing merely wore out, rusted out in the course of time and usage; it did not collapse when put to its intended use. The problem which was in *MacPherson* is simply not here, and this court's desire to follow that case does not justify its conclusion in the case at bar.

The latest exhaustive treatment of the problem seems to be in the opinion of the Supreme Judicial Court of Massachusetts in *Carter* v. *Yardley & Co.*[7] That case involved a bottle of perfume, into which some harmful ingredient had found its way so that when plaintiff Carter applied it to her skin she was burned. The case in no way resembles the one before us. But even in that case the court was careful to point out: "This statement of the principle conforms to the rule that a failure to take special precaution against a danger that is only remotely possible is not negligence."[8] In the case at bar the danger against

[5] 217 N.Y. 382, 111 N.E. 1050 (1916).

[6] He also wrote upon the subject in his *The Growth of the Law* (Yale Univ. Press 1924), p. 77.

[7] 319 Mass. 92, 64 N.E. 2d 693 (1946).

[8] *Id.*, 64 N.E. 2d at 696.

which care is alleged to have been necessary was that the railing would wear out in seven years—upkeep during the seven years being omitted from consideration. Under the rule of even such a case as *Carter* negligence was not shown in plaintiffs' case here. Many cases similar to *MacPherson* and *Carter* can be found but they are not the present case as we see it.

In our view the court in its present opinion unnecessarily goes much too far. Whether the opinion says so or not, the decision upon the facts involved establishes a rule that a person, not privy to a contract, injured by a product of a contractor or manufacturer, can go to a jury upon showing merely that the original manufacture or construction was not "good", that in the course of time and use the article wore out and after some years collapsed because of the final deterioration of a part which might have been constructed or manufactured in a different manner. And this without alleging or proving that the article would have lasted longer had it been made differently, or that the article was kept in good repair, or any other factual connection between the work and the injury, or even that the customary practice in the trade was not followed or that the contractor failed to exercise the care a reasonably prudent man would exercise in view of the fact that the article would normally and inevitably wear out sometime. This, to us, is revolutionary, and we believe it unsound. It makes a contractor or manufacturer an insurer, it makes him liable in the jury room for conditions arising during a long interim period of safe use, for a condition over which he has no control and no power to remedy. It lays manufacturers and contractors open to the caprice of juries, under the pressure of dramatic injuries, in a field of the law in which courts have heretofore been careful to subject manufacturers to a sound rule of liability but not to throw them open to claims by any user at any time without direct and specific showing. The necessity, as a matter of

public policy, of reasonable limitations upon this liability has always heretofore impressed the courts.

Finally we come to the rule which governed the trial judge in acting upon the motion. In *Tobin* v. *Pennsylvania R. Co.*[9] we quoted from the *Restatement*:[10]

> "'e. *Function of trial court.* If there is no legislative enactment covering the circumstances of a particular case and there is no decision of an appellate court which establishes whether particular conduct is or is not negligent, a trial judge may withdraw a case from a jury whenever the jury could not reasonably find the defendant's conduct to be negligent.'"

We then said:

> "The rule stated in the Restatement of the Law of Torts is almost identical in terms with the general rule of the District of Columbia concerning motions for directed verdicts."

It seems to us clear that, had plaintiffs gone to trial and proved only what they said they would prove, the jury could not reasonably have found, on the basis of those facts alone, that the contractor's conduct was negligent. We agree with the trial judge.

II

In Respect to the Landlord

We woud affirm as to the landlord, because no factual case of negligence was made out against the contractor. Since the contractor's negligence is the only factual basis upon which liability of the landlord is premised, the whole case falls.

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[9] 69 App. D.C. 262, 266, 100 F. 2d 435, 439 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640, 83 L. Ed. 1040, 59 S. Ct. 488 (1939).

[10] RESTATEMENT, TORTS § 285, Comment.

The court discusses *Bailey* v. *Zlotnick*[11] and *Bowles* v. *Mahoney*.[12] The *Bailey* case held that, where it is the tenant's duty to repair but the landlord does in fact repair, the landlord is under a duty not to create an unsafe condition. In the case at bar the unsafe condition had existed long before the repair work was done in 1942. The repairs then made did not create a defective condition; they remedied an existing condition. The remedy was effective for seven years. So the landlord was not liable as of 1942, under the doctrine of *Bailey*. The 1949 defect grew gradually over the years due to rust. *Bowles* held that where a landlord has no duty to repair he is not liable for negligence in failing to repair. This landlord had no duty to repair. So he was not liable for the defective condition which developed from 1942 to 1949. Alternatively, therefore, we would affirm as to the landlord upon the basis of *Bailey* and *Bowles*.

BASTIAN, *Circuit Judge*, having entered the judgment appealed from while a member of the District Court, took no part in the hearing or consideration of this appeal.

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[11] 80 U.S. App. D.C. 117, 149 F. 2d 505 (D.C. Cir. 1945).

[12] 91 U.S. App D.C. 155, 202 F. 2d 320 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 935, 97 L. Ed. 719, 73 S. Ct. 505 (1953).

Filed October 2, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

C. A. 5600-50

No. 13,950

HELEN HANNA and CICERO HANNA, *Appellants*,

v.

ANNIE C. FLETCHER, Trustee of the Estate of Florence Johnson, and FRED S. GICHNER IRON WORKS, INC., *Appellees*.

APPEAL FROM the United States District Court for the District of Columbia.

Before: EDGERTON, *Chief Judge*, and BAZELON and DANAHER, *Circuit Judges*.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment ——— of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with directions to award a new trial.

It is further ORDERED by the Court that appellants herein recover from appellees their taxable costs on this appeal, and have execution therefor.

Dated: October 2, 1958.

PER CIRCUIT JUDGE BAZELON.

Separate dissenting opinion by Circuit Judge Danaher.

Filed November 5, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

No. 13,950

HELEN HANNA and CICERO HANNA, *Appellants*,

v.

ANNIE C. FLETCHER, Trustee of the Estate of Florence Johnson, and FRED S. GICHNER IRON WORKS, INC., *Appellees*.

Before: PRETTYMAN, *Chief Judge*, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, in Chambers.

Order

Upon consideration of the petition of appellee Fred S. Gichner Iron Works, Inc., for a rehearing en banc and of appellants' answer, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: November 5, 1958.

Circuit Judge Wilbur K. Miller would grant the petition for rehearing en banc.

Judge Bastian announced that he would not vote in favor of rehearing *en banc* because there is necessarily involved the issue decided in the first *Hanna* v. *Fletcher* appeal and, accordingly, he feels that he is disqualified.

having sat as District Judge on the original case, which was reversed by this court. Judge Bastian feels, however, that he must add that he would otherwise vote for the rehearing *en banc* and that the 4-3 decision in the first appeal should be reviewed and reversed as soon as another case arises involving the same point.